Supreme Court, U.S.
FILED
MAR 5 1992
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No. 91-1192

In The

Supreme Court of the United States

October Term, 1991

LAKE AT LAS VEGAS INVESTORS GROUP, INC.,

Petitioner,

v.

TRANSCONTINENTAL CORPORATION, TRANSNEVA CORPORATION and TRANSNEVA LIMITED PARTNERSHIP,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT

I. Respondents' Contention That There Is No Split Among The Circuits On The Interpretation And Application Of The "Two Dismissal Exception" Of Federal Rule Of Civil Procedure 41(a)(1) Is Erroneous.

Respondents acknowledge that the "two dismissal exception" of Rule 41(a)(1) "contains no distinction between a first dismissal by stipulation or notice", but then inconsistently argue that because the first dismissal in *Poloron*[1] was by stipulation while the first dismissal here was by notice there is no conflict between the Ninth Circuit decision herein and the Second Circuit's decision in *Poloron*. (Respondents' Br., p. 3).

The Ninth Circuit held that the draconian sanction of the "two dismissal exception," which indisputably was designed to deter harassment of defendants by the filing and voluntary dismissal of successive actions based on the same claim, must be mechanically applied whether or not application served the purpose of the "exception" in the case presented. In direct contrast, the Second Circuit in *Poloron* (534 F.2d at 1017) held:

> *Where the purpose behind the "two dismissal" exception would not appear to be served by its literal application,* and where that application's effect would be to close the courthouse doors to an otherwise proper litigant, a court should be most careful not to construe or apply the exception too broadly. (Emphasis added.)

A clear conflict exists between the Second Circuit's holding that application of the "exception" is not mandatory if the policy of the "exception" would not be

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[1] *Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery,* 534 F.2d 1012 (2d Cir. 1976).

served, and the Ninth Circuit's holding mandating literal application of the "exception".[2]

II. Respondents Attempt To Avoid The Split Among The Circuits On The Application Of The *Erie* Doctrine To Res Judicata.

Respondents do not dispute the existence of a widespread split among the Circuits over whether state or federal law governs res judicata in a diversity action.[3]

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[2] As in *Poloron*, the first dismissal in this case, while not by stipulation, also was not a voluntary unilateral act. The uncontradicted affidavit filed below by Investors' former counsel confirmed that the first dismissal was filed because he believed it was compelled by Nevada law.

[3] Respondents misleadingly claim that Investors did not argue this issue either in the district court or in its briefs before the Ninth Circuit. Until the Ninth Circuit Panel issued its original Opinion, there was no dispute that state law governed that issue in this diversity action. Ninth Circuit law had always so held. *E.g., Washington Public Power Supply System v. Pittsburgh Des Moines Corp.*, 876 F.2d 690, 699 (9th Cir. 1989); *Gramm v. Lincoln*, 257 F.2d 250, 255 n.6 (9th Cir. 1958). In the district court, both parties acknowledged that state law governed by citing only Nevada law. In a subsequent motion in the district court addressing the identical issue, respondents made the point express:

> In a diversity case, this court must apply the claim preclusion law of the state in which it sits. *Constantini v. Trans World Airlines*, 681 F.2d 1199 (9th Cir. 1982); *St. Paul Fire & Marine Ins. Co. v. Weiner*, 606 F.2d 864 (9th Cir. 1979). The rule applies even when the prior action was in federal court. *Constantini v. Trans World Airlines, supra*. This Court must apply the claims preclusion law of Nevada.

Investors' brief to the Ninth Circuit cited diversity as the basis for federal jurisdiction and Nevada law that a judgment is res judicata as to the parties and their privies. It was not until the Ninth Circuit Panel issued its original Opinion applying federal law that the

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Instead, seeking to side-step the clear need for this Court's guidance to settle the confusion and split among the Circuits on the application of the *Erie* doctrine to res judicata, and with an unfortunate lack of candor, respondents speciously claim (at p. 5) that there is uncertainty in the Ninth Circuit's Opinion in that "[o]ne cannot tell whether the Ninth Circuit determined the Nevada Supreme Court would likely adopt the 'substantially the same' test or whether the court simply applied it as a matter of federal law." *No such uncertainty exists.* In its original Opinion, the Ninth Circuit first noted that "Investors argues that privity is required" (A-10), a point on which Investors' brief cited only Nevada law. But, ignoring Nevada law, and citing only a treatise on *federal* practice, the Ninth Circuit held:

> *[W]e* reject the argument for a strict privity requirement. Nevertheless, *we* agree with Investors that the weight of authority requires at least a relationship between the dismissed party and the party seeking to claim the benefit of the bar.[4] . . .
>
> *Privity, in its traditional sense, is absent,* but the relationship between Transcontinental and the two Transneva defendants is substantial. . . . *We* need not define the precise parameters of the applicable test. ***We hold*** only that the wholly-owned subsidiary and the partnership in which that subsidiary is the general partner may invoke the rights of the subsidiary's parent for purposes of Rule 41(a)(1) res judicata. (A-10 - A-11) (emphasis added.)

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issue first arose, and Investors immediately filed its Petition for Rehearing properly raising the issue. When the Panel's Amended Opinion did not address or correct its error, a Renewed Petition for Rehearing was filed.

[4] Contrary to the Ninth Circuit's statement, Investors contended only that Nevada law required privity, not that "a relationship" was necessary.

In its Amended Opinion, the Ninth Circuit merely substituted a conclusion that the relationship between Transcontinental and the Transneva Defendants is "substantially the same" instead of "is substantial". (A-24) The Ninth Circuit did not even mention Nevada law or a single Nevada case on the issue of res judicata, but simply created a res judicata test as a matter of federal law.[5]

Respondents' claim (at pp. 5-6) that granting a writ of certiorari would require this Court to decide an issue of state law is similarly erroneous and disingenuous. Contrary to Respondents' assertion, the Nevada Supreme Court in *Paradise Palms*[6] did not cite *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n*[7] "for the proposition that *res judicata* did not require mutuality of privity". (Emphasis added.) Even a cursory review reveals that both *Paradise Palms* and *Bernhard* were collateral estoppel (issue preclusion) cases, *not* res judicata (claims preclusion)

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[5] In Point C of their Brief (at pp. 6-7), Respondents acknowledge that the Ninth Circuit's original Opinion found privity lacking between Transcontinental and the Transneva Defendants, but argue that the Ninth Circuit ultimately made no definitive determination regarding privity because its Amended Opinion deleted that finding and concluded that Transcontinental and Transneva Defendants were "substantially the same." However, as was set forth at pages 13-14 of Investors' Petition concerning the Ninth Circuit's erroneous application of federal law, the Ninth Circuit's use of a "substantially the same" test also conflicts with established Nevada law, so that cosmetic attempt to correct its disregard of the *Erie* doctrine without changing the result only substituted one contravention of the *Erie* doctrine for another.

[6] *Paradise Palms Community Association v. Paradise Homes*, 89 Nev. 27, 505 P.2d 596, *cert. denied*, 414 U.S. 865 (1983).

[7] 19 Cal.2d 807, 122 P.2d 892 (1942).

cases.[8] As set forth in Investors' Petition for Writ of Certiorari (at pp. 13 and 17-22), while mutuality of privity has been eliminated as a condition of applying collateral estoppel to nonparties, neither Nevada nor federal law has eliminated mutuality of privity as a requirement of res judicata (claims preclusion), and to do so would conflict with due process rights.

III. Respondents Do Not Address The Conflict Between The Ninth Circuit Decision And Federal And Constitutional Law.

In Part III of the instant Petition, Investors show that if *federal* law governs res judicata in a diversity action, the Ninth Circuit's decision conflicts with decisions of this Court, federal policy and Investors' due process rights. Respondents' Brief fails to refute the need for resolution of these important federal and constitutional issues.

Respectfully submitted,

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[8] Many opinions loosely use the term "res judicata" to refer either to issue preclusion or to claims preclusion. *Bernhard* used the term "res judicata" in reference to issue preclusion (collateral estoppel).